IN THE

SUPREME COURT OF THE UNITED STATES

FRANK XAVIER FRANCISCO,

Petitioner

v.

J. S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent

BRIEF IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

Andrew P. Miller
Attorney General of Virginia

Gilbert W. Haith
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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v.

J. S. GATHRIGHT, Superintendent,
Bland Correctional Farm,

Respondent

BRIEF IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

The respondent, J. S. Gathright, Superintendent of Bland Correctional Farm, respectfully submits the following Brief in response to the Petition for a Writ of Certiorari in the above matter. The parties will be referred to herein by their respective positions in the court below, i.e., petitioner and respondent, or by their respective positions in the State trial court, i.e., defendant and Commonwealth. In addition to the material set out as an appendix to the Petition for a Writ of Certiorari, the respondent has attached to this Brief further matters in the nature of an appendix, as exhibits, and reference thereto will be made throughout the Brief herein.

QUESTIONS PRESENTED

1. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings On An Issue Which Had Not Yet Been Fully Decided By The State Courts And On An Issue Upon Which Relief Could Be Obtained In The State Courts?

2. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings By Refusal Of The Court Below To Determine One Of His Two Claims On The Merits While Awaiting Determination On The Other Claim In The State Courts?

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Fairfax County, Virginia, on May 28, 1971, for illegal possession of a controlled drug with intent to distribute, in violation of § 54-524.101(a) of the Code of Virginia (1950), as amended. Following his conviction, the petitioner appealed to the Virginia Supreme Court by way of direct appeal, alleging in his petition for a writ of error a number of grounds including "Whether defendant's warrantless arrest was based on probable cause?"; "Whether probable cause alone is sufficient to authorize a police officer to validly make a forcible entry into a dwelling to arrest a person therein without an arrest warrant?"; "Whether the warrantless, forcible entry of defendant's dwelling to effect his arrest was necessitated by exigent circumstances?"; "Whether the arresting officers exceeded the permissible scope of a search and seizure incident to defendant's arrest?", all of which allegations were argued in his petition for a writ of error under the category of illegally obtained evidence; and including the allegation of "Whether it is proper to instruct the jury that conviction for possession of a controlled drug with intent to distribute may be based solely on evidence as to the quantity of the drug possessed."

In his petition for a writ of certiorari, the petitioner has set forth some of the background facts relating to the allegation of illegal search and seizure and illegal arrest, and the respondent directs the attention of the Court to the opinion of the United States District Court for the Eastern District of Virginia in Frank Xavier Francisco v. J. S. Gathright, Superintendent, Bland Correctional Farm, (C. A. No. 430-72-A-M), which is included in the appendix attached to the petitioner's petition for a writ of certiorari, and which contains a detailed review of the factual circumstances surrounding the allegation of illegal arrest and illegal search and seizure.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division, alleging that his conviction in Fairfax County Circuit Court was invalid, and raised in said petition the allegations of (a) illegal arrest and illegal search and seizure and (b) the use of an improper instruction as to the effect of the quantity on the proof of intent. In his responsive pleading thereto, entitled Answer, the respondent admitted that both of petitioner's allegations had been raised in his direct appeal to the Virginia Supreme Court, and therefore petitioner had technically exhausted his State court remedies as to those allegations. Respondent, however, pointed out further that following the denial of petitioner's petition for a writ of error to the Virginia Supreme Court, that same Virginia Supreme Court handed down the decision in Sharp v. Commonwealth, 213 Va. 269 (1972). Respondent stated in his answer that "under the holding in Sharp, it would appear that the granting of Instruction G. in the petitioner's trial constituted reversible error, and petitioner would be entitled to a new trial. Respondent says further, however, that it should be left up to the State courts to determine whether the petitioner's case is controlled by Sharp or whether there are sufficient facts to differentiate or distinguish petitioner's

case from Sharp."

The United States District Court in its opinion of January 23, 1973, denied petitioner relief on his allegation of illegal arrest and illegal search and seizure and withheld the ruling on his second allegation, agreeing with the respondent that it should be left to the State courts to determine whether petitioner's case is controlled by Sharp v. Commonwealth. In addition, the District Court ordered the Commonwealth, although not technically the respondent, on its own initiative to afford the petitioner a plenary hearing on that allegation within forty-five days of the entry of the order, although not citing any authority for such action and although the respondent had some question as to the authority of the District Court to enter such an order.

Nevertheless, the respondent proceeded to comply with the District Court's order and filed a motion in the Circuit Court of Fairfax County, requesting that Court to appoint counsel for the petitioner in order to file a petition for a writ of habeas corpus and to grant the petitioner an immediate hearing on said petition when filed. (See Exhibit A of the Appendix attached hereto). After consultation with counsel for the respondent, Judge Millsap of the Fairfax County Circuit Court, being somewhat unclear of the extent of his authority to grant the petitioner a plenary hearing in a habeas corpus matter, without a petition for a writ of habeas corpus having been filed, instructed the Clerk of his Court to forward the forms for that purpose to the petitioner, notifying counsel for the respondent of this action by a letter dated February 5, 1973. (See Exhibit B, included in the appendix hereto).

No response was received by the Circuit Court of Fairfax County from the petitioner pursuant thereto, and Judge Millsap then informed Judge Bryan of the United States District Court of the failure of the petitioner to file a petition for a writ of habeas corpus, advising Judge Bryan of all that had been done in an effort to bring on the matter before the Circuit Court of Fairfax County, and advising Judge Bryan that it was impossible to grant the petitioner a plenary hearing unless he filed a petition for a writ of habeas corpus. (See Exhibit C, included as a part of the appendix hereto). After further consultation with counsel for the respondent and with Judge Bryan, Judge Millsap upon his own initiative appointed counsel to represent the petitioner and to assist the petitioner in bringing forward the matter by way of petition for a writ of habeas corpus. (See Exhibit B, included as a part of the appendix hereto). Pursuant to that appointment and after further discussion with counsel for the respondent, the counsel appointed to represent the petitioner and Judge Millsap, it was agreed that a hearing would be held in the Circuit Court of Fairfax County, with the petitioner present in person, to determine just what further steps should be taken in this matter.

Prior to the holding of this hearing, the Circuit Court of Fairfax County, Virginia was advised of the fact that petitioner had been represented in the federal habeas corpus proceedings by Daniel C. Kaufman, Esquire, and counsel for the petitioner appointed by the Fairfax County Circuit Court, David E. Feldman, Esquire, contacted Mr. Kaufman and advised him of the pendency of the hearing in Fairfax County Circuit Court.

That hearing was held on July 27, 1973, and both Mr. Feldman and Mr. Kaufman appeared on behalf of the petitioner, Mr. Feldman being relieved of his duty by the Court, and Mr. Kaufman being appointed in his place. A transcript of that hearing was made and is attached hereto as Exhibit E, as a part of the appendix. At that hearing before the Circuit Court of Fairfax County, Virginia, on July 27, 1973, petitioner, through his counsel, specifically refused to proceed to obtain habeas corpus relief in the State courts and specifically refused to cooperate with the State courts in granting petitioner a plenary hearing to determine whether he should be in fact entitled to a new trial on the basis of Sharp v. Commonwealth.

It was during this same period of time that petitioner's appeals to the United States Court of Appeals for the Fourth Circuit from the decision of the United States District Court, Eastern District of Virginia, were pending, and following said hearing in Fairfax County Circuit Court, the decision of the Fourth Circuit from which this petition for a writ of certiorari is sought was rendered.

LAW AND ARGUMENT

1. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings On An Issue Which Had Not Yet Been Fully Decided By The State Courts And On An Issue Upon Which Relief Could Be Obtained In The State Courts?

At the time of petitioner's conviction in the Circuit Court of Fairfax County, Virginia, § 54-524.101(a) of the Code of Virginia (1950), as amended, under which petitioner was convicted, included a provision that a conviction for violation of that

section may be based solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed. That provision was subsequently repealed by the Virginia Legislature. Although petitioner raised the validity of that statutory presumption in his petition for a writ of error to the Virginia Supreme Court, the Virginia Supreme Court did not grant the petition for a writ of error and affirmed petitioner's conviction, without opinion, therefore not stating exactly why this issue was not considered grounds for a reversal. Nevertheless, the Virginia Supreme Court subsequently decided the case of Sharp v. Commonwealth, 213 Va. 269 (1972), specifically holding that the statutory presumption referred to above was unconstitutional. In Sharp v. Commonwealth, the Virginia Supreme Court did not state one way or the other whether the inclusion of such a statutory presumption as an instruction at a trial would automatically be grounds for reversal of a defendant's conviction. In fact, the Virginia Supreme Court has, since the Sharp v. Commonwealth case was decided, refused to grant petitions for writs of error in other cases where a so-called Sharp instruction was given, without stating the reasons for denying such ruling.

For this reason, and for the additional reason that the inclusion of a Sharp instruction might in fact be harmless error, the respondent took the position in its responsive pleading in the United States District Court in the instant case that relief should not be automatically granted to the petitioner on the Sharp issue, but that the Virginia Court should be given the opportunity to determine whether the inclusion of a Sharp instruction in petitioner's trial was in fact grounds for invalidating his conviction and granting him a new trial. Of

course, the United States District Court agreed with this position of the respondent. At this point in time, the petitioner had, and continues to have to this day, an ample and adequate remedy in the Virginia State courts, to have the validity of his conviction determined in light of Sharp v. Commonwealth. Respondent has never, at any time, attempted to stop the petitioner from proceeding in the State courts, and has in fact cooperated fully to allow the petitioner full opportunity to proceed in the State courts.

In addition, the Circuit Court of Fairfax County has literally bent over backwards to allow the petitioner to proceed in the State courts on the issue of Sharp v. Commonwealth and has agreed to grant the petitioner a plenary hearing and a form for determining such issue, even though the petitioner refused to file a petition for a writ of habeas corpus in that court, and even though there might be some question as to the authority of the Circuit Court of Fairfax County to proceed with a habeas corpus proceeding absent the filing of such a petition. Nevertheless, if the Circuit Court of Fairfax County had granted such a plenary hearing without the necessity of filing a petition, respondent would not have objected and would have concurred in holding such plenary hearing and would have concurred in the granting of petitioner's day in court to decide once and for all whether or not his conviction is tainted by the use of a Sharp instruction. Despite all of this, the petitioner has continued to refuse to cooperate with the State courts and has continued to insist that he wants his relief in federal courts, although the respondent is at a loss as to what difference it makes whether relief is granted in the State courts or granted in the federal courts, since in either case the result

is that the Commonwealth will be given the opportunity to retry the petitioner.

Petitioner, in his petition for a writ of certiorari, appears to indicate that the action of the United States District Court, which was affirmed by the United States Court of Appeals for the Fourth Circuit, in requiring the petitioner to go back to the State courts to determine the Sharp issue was one of forcing him to be batted back and forth between two judicial systems and had the result of delaying unnecessarily the granting of his sought after relief. However, as pointed out above, the fact of the matter is that petitioner would have had his sought for relief long ago if he had proceeded in the State courts initially, as he should have done, or at least had agreed to cooperate with the Circuit Court of Fairfax County, Virginia, when that Court offered him the opportunity to proceed. This matter would not be before this Court at this time and would not any longer be a matter of consideration if petitioner had simply brought his proceeding for a petition for a writ of habeas corpus in the courts of Virginia. The respondent is not assuring this Court and has never attempted to assure the petitioner that he in fact would obtain the sought for relief, i.e., the invalidating of his conviction, simply by filing a petition for a writ of habeas corpus in the Virginia State courts. To the contrary, what the respondent is asserting is that if the petitioner has a valid and meritorious claim for relief that the Virginia State courts are ready, willing and able to grant that relief, and that furthermore the determination of whether petitioner has such grounds for relief is a factual question which should be determined in the State courts.

The respondant is not attempting to interpose further delay to the petitioner's right of habeas corpus whatsoever, but it has attempted from the beginning to expedite the granting of habeas corpus proceedings in the Virginia State courts in order to determine the merits of petitioner's allegation. What petitioner has in fact done is attempt to deliberately bypass his available State court remedies, a practice which was deemed improper in Murch v. Mottram, ____ U. S. ____, 34 L.Ed.2d 194, 93 S.Ct. ____ (1972). The difference between petitioner's case and Roberts v. LaVallee, 389 U. S. 40, 19 L.Ed.2d 41, 88 S.Ct. 194 (1967), cited in the petition for a writ of certiorari, is that the petitioner has not really fully exhausted his State court remedies inasmuch as he has not yet presented to the State courts the question of whether his conviction is made infirm by the fact that a Sharp instruction was used at his trial. Obviously, this was not the issue confronting the Virginia Supreme Court when petitioner directly appealed his conviction, since the Virginia Supreme Court had not yet decided the case of Sharp v. Commonwealth, supra, and therefore, in effect the petitioner in his federal habeas corpus petition was raising an allegation in a different context than it had been previously raised in the Virginia Supreme Court. As pointed out in Picard v. Connor, 404 U. S. 270, 30 L.Ed.2d 438, 92 S.Ct. 509 (1971), this is sufficient basis for the District Court having sent the matter back to the State court for determination of petitioner's allegation. As in Preisser v. Rodrigues, ____ U. S. ____, 36 L.Ed.2d 439, 93 S.Ct. ____ (1973), there is in the instant case an adequate State remedy and petitioner should not be allowed to seek the intervention of a federal court until he has first sought and been denied relief in the State courts where a State

remedy is available and adequate.

2. Was The Petitioner Improperly Denied Federal Habeas Corpus Proceedings By Refusal Of The Court Below To Determine One Of His Two Claims On The Merits While Awaiting Determination On The Other Claim In The State Courts?

Although the District Court in the instant case denied and dismissed the petitioner's claims as to the allegation of illegal arrest and illegal search and seizure, in an exhaustive opinion and discussion of those allegations, the Court of Appeals determined that such a decision by the District Court was premature, in light of the probability of petitioner obtaining relief in the State courts on his allegation relating to the Sharp instruction. Petitioner now asserts that the action of the Court of Appeals was improper; however, petitioner does not rest on any constitutional basis, but only on the basis that the action of the United States Court of Appeals for the Fourth Circuit in the instant case is contrary to opinions of the Courts of Appeals of the Eighth Circuit and the Second Circuit.

Respondent has reviewed those opinions cited by the petitioner in his petition for a writ of certiorari, and would submit to the Court that the instant situation is fully distinguishable from both Tyler v. Swinson, 383 F.2d 611 (8th Cir. 1973), and United States ex rel Levy v. McMann, 394 F.2d 402 (2nd Cir. 1968). In both of those cases, the matter on which exhaustion had not been made was not a matter such as to bring about a real possibility that the petitioner's entire conviction would be set aside and ruled invalid, if sent back to the State courts, and therefore resolving and making the proceedings in the federal courts moot. In Tyler v. Swinson, the matter on which exhaustion

had not been made related to only one of four convictions, whereas the federal habeas corpus petition was attacking all four convictions, therefore, even if petitioner was required to exhaust his State remedies as to that one conviction and was successful in the State courts, it would not result in the federal court being deprived of any further necessity to have to decide the matter. In United States ex rel Levy v. McMann, the allegation upon which exhaustion had not been made was specifically determined by the court to be frivolous, and therefore had the court requiring exhaustion of that issue before proceeding to determine the merits of other allegations again would not result in a favorable decision in the State courts which would render the further federal proceedings a nullity.

To the contrary, as pointed out by the Court of Appeals below, in the instant case the granting of habeas corpus relief by the Virginia State courts on the Sharp v. Commonwealth issue would invalidate petitioner's conviction and render further proceedings in the federal courts moot. Although the granting of habeas corpus relief by the State courts would give the Commonwealth the opportunity to retry the petitioner, it's not necessarily certain that such a retrial would be had, or further that petitioner would be convicted upon said retrial. Therefore, there exists the real possibility that no decision would ever have to be made by the federal courts on the issue of illegal search and seizure and illegal arrest, and it was an appropriate act of discretion by the Court of Appeals in choosing to withhold a decision on that issue until after the petitioner had completed his proceedings in the State courts on the issue of Sharp v. Commonwealth.

CONCLUSION

For the reasons set forth above, the respondent submits that the Petition for Writ of Certiorari should be denied and the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

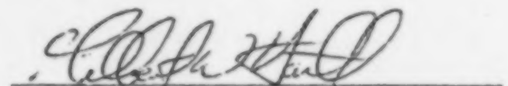
ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITH
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 1974, I mailed a copy of the foregoing Brief in Response to Petition for Writ of Certiorari to to Daniel C. Kaufman, Esquire, 1815 H. Street, N.W., Washington, D. C. 20006.



Gilbert W. Haith
Assistant Attorney General

A

VIRGINIA: **ORIGINAL COPY**

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,

Petitioner,

vs.

J. S. GARRICHT, Superintendent,
Bland Correctional Farm,

Respondent.

MOTION

Now comes the respondent, by counsel, and moves the Court as follows:

1. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that his conviction in this Court on May 28, 1971, for possession of a controlled drug with intent to distribute was invalid. One of the allegations of his petition therein related to the fact that an instruction had been given to the jury relating to the statutory presumption of quantity of possession being the sole ground for a conviction for possession with intent to distribute.

2. In an order entered January 23, 1973, (a copy of which is attached hereto as an exhibit), the United States District Court deferred consideration of that allegation on the grounds that petitioner has not fully exhausted his state court remedies as to that allegation in light of the recent decision of the Virginia Supreme Court in the case of Shaw v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972).

3. In said order, the United States District Court instructed the Commonwealth on its own initiative to afford the petitioner a hearing within forty-five days on this issue.

4. Inasmuch as it would appear to be important for the courts of the State of Virginia to determine the merits of that allegation in light of Shaw v. Commonwealth, respondent feels that necessary proceedings should be instituted in this Court as

Exhibit "A"

soon as possible to accomplish that purpose.

WHEREFORE, respondent moves this Court to immediately appoint counsel to represent the petitioner, and instruct said counsel to immediately file on behalf of said petitioner a petition for a writ of habeas corpus in this Court setting forth the allegation referred to above, and further, that a hearing be scheduled before this Court on said allegations within forty-five days from and after January 23, 1973.

J. S. GARRICHT, Superintendent,
Bland Correctional Farm

By_____
Counsel

Gilbert W. Haith
Assistant Attorney General
911 East Broad Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 1973, a copy of the foregoing Motion was mailed to Frank Xavier Francisco, No. 96916, Bland Correctional Farm, Bland, Virginia, 24315.

Gilbert W. Haith
Assistant Attorney General

F.1.C.

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
February 5, 1973.

Mr. Gilbert W. Haith,
Assistant Attorney General,
Supreme Court Building,
1101 East Broad Street,
Richmond, Virginia. 23219

Re: Francisco v. J. S. Cathright,
Superintendent.

Dear Mr. Haith:

The Clerk of the Court has this date mailed to Mr. Francisco three copies of the forms for petition for writ of habeas corpus to be executed and filed by the petitioner in this court. Mr. Francisco has been advised that upon filing the petition for writ of habeas corpus counsel would be appointed for him and the case scheduled for trial immediately.

The Clerk of the Court will forward to you a copy of the petitioner's writ of habeas corpus when the same has been received.

Very truly yours,

Burch Millsap.

BM:elc

Exhibit "B"

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA

PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

ARTHUR W. SINCLAIR
BARNARD F. JENNINGS
JAMES KEITH
WILLIAM G. PLUMMER
LEWIS D. MORRIS
PERCY THORNTON, JR.
BURCH MILLSAP
JAMES C. CACHERIS
JUDGES

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
June 12, 1973.

Honorable Albert V. Bryan, Jr.,
Judge, United States District Court,
Eastern District of Virginia,
Post Office Building,
Alexandria, Virginia. 22313

Re: Frank Xavier Francisco v. J. S. Cathright;
Your Civil Action 430-72-A-M.

Dear Judge Bryan:

Mr. Gilbert W. Haith, Assistant Attorney General for the Commonwealth of Virginia, in compliance with your order concerning the above-captioned case, filed a motion requesting the appointment of counsel and immediate filing of a petition for a writ of habeas corpus in this court on behalf of Mr. Francisco. Mr. Young, administrative clerk of the court, and at the request of the court, mailed to Mr. Francisco on February 5, 1973, three petitions for writ of habeas corpus. Mr. Young requested expedious filing of the petition and informed Mr. Francisco that an attorney would be appointed to assist him upon filing of the petition.

This court has not received any communication from Mr. Francisco and Mr. Francisco has not filed with the court a petition for writ of habeas corpus, therefore the court feels it cannot comply with your request to afford a hearing to Mr. Francisco within 45 days. The court will immediately give him a hearing upon the filing of a petition with the court for a writ of habeas corpus.

Very truly yours,

Burch Millsap.

BM:elc

cc: Gilbert W. Haith, Esq.

Exhibit "C"

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FRANK XAVIER FRANCISCO,	)
Petitioner	)
VS.	)
J. S. GATHRIGHT, Superintendent Bland Correctional Farm,	)
Respondent.	)

It appearing to the Court that counsel should be appointed in this case to consult with the Petitioner and investigate any matter which the Defendant desires to bring to the Court's attention.

It is therefore, ADJUDGED and ORDERED that David E. Feldman, an able and experienced Attorney at Law, practicing before this Court be appointed to represent the Petitioner to consult, and investigate and assist the Petitioner in filing any petitions which he desires to file.

ENTER: June 19, 1973

Burch Millsap
JUDGE

A COPY TESTE:
W. FRANKLIN GOODING, CLERK
By: [illegible] CLERK
Deputy Clerk

Exhibit "D"

WARD & PAUL
410 First Street, S.E., Washington, D.C. 20003

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)
v.	) Criminal No. 16767
FRANK X. FRANCISCO	)

Fairfax, Virginia

Friday, July 27, 1973.

The above-entitled matter came on for hearing before THE HONORABLE BURCH MILLSAP, Judge of the Circuit Court of the County of Fairfax, in Court Room No. 4 of the Fairfax County Court House, commencing at 10:00 A. M., on Friday, the 27th day of July, 1973.

APPEARANCES:

On behalf of the Commonwealth:

GILBERT W. HAITH, Esq.
Assistant Attorney General

On behalf of the defendant:

DAVID E. FELDMAN, Esq.
and
DANIEL C. KAUFMAN, Esq.

- o - 0 - o -

Exhibit "E"

WARD & PAUL
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P R O C E E D I N G S

(The Court Reporter was first duly sworn.)

THE COURT: Commonwealth of Virginia versus Frank X. Francisco. Are the parties ready? Is Mr. Francisco present? Have a seat at counsel table.

Let the record show that the Commonwealth of Virginia is reprosted by its Assistant Attorney General. The defendant is present in court represented by his attorney, Mr. Feldman.

MR. FELDMAN: For the record, Your Honor, I did get ahold of Mr. Kaufman the other day and I assume this is Mr. Kaufman.

MR. KAUFMAN: Yes.

MR. FELDMAN: He indicated the would like to stay on the case. He did not realize this proceeding was coming up, so if the Court would have no objection, I have no objection to withdrawing from the case.

THE COURT: Mr. Kaufman, did you represent the defendant in the federal proceeding?

MR. KAUFMAN: Yes, I did.

THE COURT: Are you still representing him in federal proceedings?

MR. KAUFMAN: Yes, I am.

THE COURT: The Court would give Mr. Feldman leave to withdraw as counsel for Mr. Francisco and would appoint Mr. Kaufman to represent Mr. Francisco. Have you discussed this with Mr. Francisco to see if there is any objection?

MR. KAUFMAN: Yes, we have and he has no objection.

THE COURT: He is agreeable to your appointment?

MR. KAUFMAN: Yes.

MR. FELDMAN: Thank you, Your Honor.

THE COURT: This matter is coming on somewhat on motion of the Court because of the federal court proceedings wherein the federal court granted the request of the Attorney General that this matter be resolved in a state court rather than on the federal level.

The Court directed the Clerk to mail to the defendant forms for the filing of a petition for a writ of habeas corpus and after a sufficient length of time had expired, the defendant having failed to file the petition for a writ of habeas corpus and after notifying the defendant that counsel would be appointed to represent him upon the filing of the writ, the Court then directed that he be returned to the Fairfax County Jail for the appointment of counsel.

As of this time no motions are pending before the court and the Court would be interested, Mr. Kaufman, in any

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statements you might have to the court if it's your intention to file any motions, not file any motions, if you have been directed by Mr. Francisco to file or not file.

MR. KAUFMAN: I would state as follows, Your Honor. I have discussed this matter fully with Mr. Francisco and it is my advice to him that he not file a state habeas corpus petition and he has agreed with me that it is not in his best interest to so do and he would object to any state habeas corpus proceedings being conducted in this matter.

THE COURT: On the motion for a new trial, he directed you not to file such a motion on his behalf?

MR. KAUFMAN: I have discussed the matter with him fully and he has come to the conclusion it would not be in his best interest to obtain a new trial and for that reason no motion has or will be filed for a new trial on that basis.

THE COURT: Do you have any statements?

MR. HAITH: Yes, sir, Your Honor.

The Commonwealth has, under an order from the Federal District Court, to grant Mr. Francisco a plenary hearing or otherwise a habeas corpus hearing on the state court level on the issue of the Sharp versus Commonwealth case.

It is the Commonwealth's position that the refusal of the defendant to accept state habeas corpus proceedings

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would, in fact, be a voluntary waiver of any right to exhaust his remedies in the state court on that issue and I simply want to make sure for the record that the defendant is fully aware of the fact that this can be construed as a waiver and it will be the Commonwealth's position that it is, in fact, a waiver of his right to have a new trial on the Sharp issue.

THE COURT: The Court is in receipt of a letter from Judge Albert V. Bryan, United States District Court for the Eastern District of Virginia. He stated he did not feel the petition would have to take any initiative. The Court is not clear as to the intention of Judge Bryan in that statement. If, and in the event, the Attorney General was directed to file a petition for a new trial, the motion for the new trial in the court on the Sharp case, would the defendant, Mr. Francisco, cooperate in the case?

MR. KAUFMAN: I have not fully discussed this particular aspect of it but my present feeling is that he would not so cooperate and it's our position that we have fully exhausted all of our state remedies in accordance with the relevant decisions of the United States Supreme Court and to allow the state to obtain a new trial on whatever grounds it chooses would be a violation of Mr. Francisco's right against double jeopardy.

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THE COURT: Does Mr. Francisco wish to take the stand and make any statement for the record?

THE DEFENDANT: No, Your Honor.

THE COURT: Any further statement?

MR. HAITH: Well, Your Honor, in light of the petition of the defendant, there is nothing else the Commonwealth can do. I intend to submit this back to Judge Bryan on the basis that the defendant has intentionally waived his right to state court relief and has intentionally bypassed the state courts in this matter and will never be entitled to a new trial on the grounds of the Sharp issue.

THE COURT: It would be the opinion of the Court that if the defendant in this case directs his counsel not to proceed in any manner in the state court and also upon any action by the Attorney General by way of motion to bring the case before the Court, the Court cannot force upon this defendant any state proceeding if he does not wish to pursue it himself.

The Court, I do not believe, would have the authority to represent the defendant, so, therefore, there is no proceedings in the Commonwealth of Virginia.

The Court will remand the defendant to the custody of the sheriff to await transportation back to Bland Correctional Institute.

MR. HAITH: Thank you, Your Honor.

(Whereupon, at 10:10 A. M., the hearing in the above-entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, William B. Peters, a Certified Verbatin Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter to the best of my knowledge and ability.

William B. Peters
Certified Verbatin Reporter

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